

# Why Federal Employees Have the Right to a Hearing

When drafting the current adverse action system, Congress chose to provide employees with the right to a third-party, post-action review process of suspensions of more than 14 days, demotions, or removal actions. The agency responsible for conducting these reviews is the U.S. Merit Systems Protection Board (MSPB).<sup>140</sup> When appearing before MSPB, the agency has the responsibility to prove its case.<sup>141</sup> Congress also chose to provide judicial review of MSPB decisions.<sup>142</sup>

By statute, employees are entitled to “a hearing for which a transcript will be kept” and to be represented by an attorney or other chosen representative.<sup>143</sup> The statute also provides that the Board (the three presidentially appointed, Senate confirmed members), or an employee designated by the Board to hear such cases, “shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing” if the appellant exercises that right.<sup>144</sup>

The U.S. Court of Appeals for the Federal Circuit has determined that when Congress granted this right to a hearing, “Congress took its cue from the Supreme Court’s decision in *Arnett v. Kennedy*. . . Congress in the [Civil Service] Reform Act substantially adopted the procedure approved by the Court and charged the Board with the job of protecting the rights of employees.”<sup>145</sup> This process for granting a post-action hearing, as well as the right to judicial review, is also consistent with later decisions by the Supreme Court regarding the due process rights of public sector employees.<sup>146</sup>

Thus, these statutory provisions may be an example of language chosen by Congress to provide the Government with instructions on the particular manner in which Congress wants the Government to comply with constitutional requirements that exist independently from the statute itself. After all, the statute gives the right to a hearing only to employees (whose constitutional rights are at stake), but

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<sup>140</sup> 5 U.S.C. §§ 7513(d), 4303(e).

<sup>141</sup> 5 U.S.C. § 7701(c)(1).

<sup>142</sup> 5 U.S.C. § 7703(a)(1).

<sup>143</sup> 5 U.S.C. § 7701(a).

<sup>144</sup> 5 U.S.C. § 7701(b)(1).

<sup>145</sup> *Callahan v. Department of the Navy*, 748 F.2d 1556, 1558-59 (Fed. Cir. 1984) (internal citations and punctuation omitted). (*Arnett* was the predecessor case to *Loudermill* in effect at the time the relevant statutes were enacted.)

<sup>146</sup> In *Cleveland Board of Education v. Loudermill*, the Supreme Court explained that the reason why the Court found that due process in that case only required notice and an opportunity to respond before removal rested “in part on the provisions in Ohio law for a full post-termination hearing.” This post-termination hearing included not only “a full administrative” process but also “judicial review.” *Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). For a more in-depth discussion of due process rights, see U.S. Merit Systems Protection Board, [What is Due Process in Federal Civil Service Employment](#) (2015).

is silent concerning the right of agencies to obtain a hearing. The current system may not be the only constitutionally permissible approach, but it is consistent with past decisions by the Supreme Court and is the system that has been accepted by the Supreme Court in multiple decisions.<sup>147</sup>

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<sup>147</sup> See, e.g., *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2130-31 (2012) (describing the right to appeal an adverse action to MSPB and obtain judicial review of MSPB's decision); *U.S. Postal Service v. Gregory*, 534 U.S. 1, 5-7 (2001) (explaining the roles of MSPB and its reviewing court); *United States v. Fausto*, 484 U.S. 439, 443 (1988) (explaining that the statutory framework for an adverse action offers in "great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review"). Cf. Respondent's Brief, *Helmann v. Department of Veterans Affairs* (No. 2015-3086) (Jun. 1, 2016), at 35-44 (explaining that the Department of Justice had concluded that a section of a bill intended to streamline certain adverse action cases involving the Senior Executive Service violated the appointments clause of the Constitution and should therefore be declared invalid).